NO. 80922-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON,

JESSE MAGAÑA,

Petitioner,

vs.

HYUNDAI MOTOR AMERICA; HYUNDAI MOTOR COMPANY;

Respondents,

and

RICKY and ANGELA SMITH, husband and wife; et al.,

Defendants.

PETITIONER MAGAÑA'S ANSWER TO BRIEF OF AMICUS CURIAE ASSOCIATION OF WASHINGTON BUSINESS

Paul W. Whelan, WSBA 2308
Ray Kahler, WSBA 26171
STRITMATTER KESSLER WHELAN COLUCCIO

Derek Vanderwood, WSBA 24257
ENGLISH, LANE, MARSHALL, BARRAR STAHNKE & VANDERWOOD, PLLC

Peter O'Neil, WSBA 28198
PETER O'NEIL, ATTORNEY AT LAW

Michael E. Withey, WSBA 4787
LAW OFFICES OF MICHAEL WITHEY

Alisa K. Brodkowitz, WSBA 31749
BRODKOWITZ LAW

WIGGINS & MASTERS, P.L.L.C.
Charles K. Wiggins,WSBA 6948
Kenneth W. Masters, WSBA 22278
241 Madison Ave. North
Bainbridge Island, WA 98110
(206) 780-5033

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

MISCELLANEOUS

INTRODUCTION

AWB asserts that "the heart of this case" is whether "a trial judge [may] commandeer a live factual dispute away from the jury, to serve the court system's perceived needs for speed and deterrents?" AWB 1. A trial judge controls the courtroom; she does not "commandeer" anything. In any event, the heart of this case is whether Jesse Magana was substantially prejudiced by willfully false discovery responses for many years. AWB is the intermeddler attempting to commandeer this case into a jury issue instead of a sanction issue. Judge Johnson held a three-day evidentiary hearing and entered extensive findings on the key factors: willfulness, substantial prejudice, and no adequate lesser sanction. Judge Johnson gave Magana the justice that Hyundai perversely denied for years.

AWB asks this Court to focus exclusively on the right to jury trial, reminding the Court to recur to fundamental principles. AWB 1. AWB forgets another fundamental principle, that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. Art. I, § 10.

AWB disingenuously bemoans the "imbalance" in the cost and burden of litigation and discovery between "small-records

litigants" and "record-laden opponents." AWB 2. Let there be no mistake about it. The burdens and costs of litigation, including discovery, fall disproportionately heavily on a severely injured plaintiff like Jesse Magaña who sues a multi-billion dollar corporation like Hyundai, incurring hundreds of thousands of dollars in expert expenses and out-of-pocket costs, only to be delayed in obtaining justice by willfully false discovery responses.

ARGUMENT

> *"To no one will we sell, to no one will we deny or delay right or justice."* ***Magna Charta of 1215*** § 40.
>
> *"Justice delayed is justice denied."* ***Lane v. City of Seattle,*** 164 Wn.2d 875, 888, 194 P.3d 977 (2008).

A. A party waives the right to jury trial by willfully false discovery responses that conceal material evidence to the prejudice of the adverse party.

AWB provides an articulate and erudite discussion of the origin and importance of the right to jury trial, richly footnoted with historical references and suitable for publication in a law review. But the entire discussion is fatally flawed by AWB's truncated quotation of our Constitution: "The right of trial by jury shall remain inviolate." AWB 4 citing Wash. Const. Art. I § 21. Only in a footnote does AWB acknowledge that the right to jury trial may be waived. AWB 4, n.4. And therein lies the rub.

The complete language of Art. I, § 21 reads:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The flaw in AWB's analysis is that the Legislature has provided for waiver of the jury where a party withholds discovery:

> Our first legislature provided that
>
> "If a party refuses to attend and testify at the trial, or to be examined upon a commission, or to answer any interrogatories filed, his complaint, answer, or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases for a contempt: *Provided*, That the preceding sections shall not be construed so as to compel any person to answer any question, where such answer may tend to criminate himself." Laws of 1854, Civil Practice, Chapter XXXIII, § 310, p. 190.
>
> The statute appeared in all codes of the state until 1957 when, having been abrogated and superseded by Rule 37, it was repealed. Laws of 1957, chapter 50, § 1.

Mitchell v. Watson, 58 Wn.2d 206, 211, 361 P.2d 744 (1961) (footnote omitted.)

This statute, from our earliest territorial Legislature, clearly provides for a waiver of the right for jury trial; the only question is whether the waiver must be express or can be implicit. That question was answered in the early days of statehood. ***State ex***

rel. Clark v. Neterer, 33 Wash. 535, 74 Pac. 668 (1903). In ***Neterer***, the trial court refused to set a case for trial by jury because neither party had served or filed a jury demand or paid the jury fee, as required by statute. This Court concluded in ***Neterer***, that, "the word 'consent,' as used in this provision of the constitution, was intended to be used so as to include both express and implied consent." *Id.* at 540. The Court noted that, "[t]he legislature therefore may define what act shall constitute consent given," and that the parties had impliedly consented to waive their right to jury trial. *Id.* at 541. The Court reaffirmed the holding of ***Neterer*** in ***Sackett v. Santilli***, 146 Wn.2d 498, 508, 47 P.3d 948 (2002).

The territorial and state legislatures consistently provided for an implied waiver when they provided for a default for the failure to respond to discovery. In addition, parties can waive their right to jury trial in many ways. If Magaña had not filed this lawsuit within three years after sustaining injury, the statute of limitations would have barred his right to a jury trial. If Hyundai had not answered or appeared in the action within 20 days, Hyundai could have been defaulted and would have lost its right to jury trial. If both parties had failed to timely demand a jury and pay the jury fee, both parties

would have waived their right to jury trial. CR 38(b), (d). If Hyundai had not filed a notice of appeal within 30 days after the judgment on the first jury trial became final, Hyundai would have waived its right to a second jury trial. In the same way, Hyundai forfeited its right to a jury trial when it willfully lied and withheld evidence clearly subject to discovery which was both material and relevant.

Our Constitution guarantees a fair jury trial, not a sham in which one party conceals evidence and the other party litigates with one hand tied behind its back. Not every delay in discovery justifies a default, but a party loses the right to a jury trial by giving willfully false responses to discovery, failing to correct or supplement the false answers for years, and then producing some – but not all – of the concealed documents on the eve of the scheduled trial date. Just as this Court has observed that "[n]o civilized society could lay claim to an enlightened judicial system" without statutes of limitations, ***Ruth v. Dight***, 75 Wn.2d 660, 664, 453 P.2d 631 (1969), so too, no civilized society could maintain an enlightened judicial system in which a party could lie about discovery and withhold relevant discovery while simultaneously insisting that the trial judge must accommodate the disruptions caused by the lies,

alter the court's schedule, inconvenience jurors already summoned for service, all for the benefit of the party in the wrong.

AWB fails to cite a single case in support of its theory that a default for discovery abuse violates the constitutional right to jury trial. But a number of cases have rejected AWB's theory. *E.g.*, ***Olcott v. Del. Flood Co.***, 327 F.3d 1115, 1124 (10th Cir.), *cert. denied sub nom.* ***Gales v. Olcott***, 540 U.S. 1089, 124 S.Ct. 958, 157 L.Ed.2d 794 (2003); ***Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc.***, 982 F.2d 686, 692 n.15 (1st Cir. 1993); ***Adriana Int'l Corp. v. Thoeren***, 913 F.2d 1406, 1414 (9th Cir. 1990), *cert. denied sub nom.* ***Lewis & Co. v. Thoeren***, 498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991); ***Rao v. WMA Sec. Inc.***, 2008 WI 73, ¶¶ 48-50, 752 N.W.2d 220. Some courts have held that a defendant defaulted on liability retains the right to a jury trial on damages. *E.g.*, ***Curbelo v. Ullman***, 571 So. 2d 443, 444 (Fla. 1990); ***Wood v. Detroit Auto. Inter-Ins. Exch.***, 413 Mich. 573, 583-84, 321 N.W.2d 653, 658-59 (1982). But the issue of jury trial on damages does not arise here because Magaña's damages were established by the first trial and affirmed by the Court of Appeals in the first appeal.

B. This default for Hyundai's "egregious" discovery violations is not a mere "case management decision."

AWB inaccurately compares the default judgment against Hyundai to a "case management decision," pejoratively characterizing the default as "the kind of arbitrary, one-person rule that the Washington Constitution is designed to avoid." AWB 16-20. The Court should categorically reject this demeaning description of the default judgment. This default was not entered for a violation of some routine scheduling order or case management procedure. Rather, default was entered for Hyundai's "egregious," "willful," and "false" discovery responses. FF 53, CP 5329. At the time Hyundai falsely answered RFP 20, Hyundai's legal department had already considered and rejected two prior claims for seatback failures in Hyundai Accents. FF 40-42, CP 5324-25. These two claims, Martinez and McQuary, were "material and significant to the issues in the case." *Id.* These OSIs were "wrongfully and willfully not provided in Hyundai's initial response of May 2000," and would not be disclosed by Hyundai for six more years, on January 6, 2006, on the eve of the retrial. *Id.*

By the time of the first trial in 2002, Hyundai had received four more claims for seatback collapse in Accent models, FF 15,

CP 5317, and these too were wrongly withheld from discovery. These seatback collapses "went to the heart of plaintiff's claim." FF 46, CP 5327. Hyundai received other seatback collapse claims for similar seatbacks in models other than the Accent, including the Urice claim, which the trial court found to be "highly material to the issues in the case." FF 48-49, CP 5327. And Hyundai still had not produced the Acevedo claim by the time of the sanctions hearing, even though the trial court found Acevedo to be "highly relevant." FF 28, CP 5321.

AWB ignores all of these facts, which inconveniently destroy the relevance of AWB's assault on the ability of trial judges to control their dockets through case management techniques.

Finally, AWB relies on the appellate court's criticism of Magaña's counsel for asking Hyundai to supplement its five-year-old discovery responses four months prior to the date of the retrial. AWB 19 ("Did Respondent play that card at that time to force a default?"). The request for supplementation was neither a playing card nor a tactic; it was legitimate trial preparation to ask for an update of five-year-old discovery responses. Magaña's counsel had no idea that Hyundai had lied in its discovery responses and

had egregiously withheld OSIs directly responsive to Magaña's discovery requests. CP 2349, 4792-93.

More fundamentally, AWB, like the appellate court majority, is blaming the victim, not the perpetrator. It is outrageous to blame Magaña's counsel for legitimately requesting supplementation of discovery responses while simultaneously ignoring Hyundai's in-house legal counsel's egregious misconduct in denying that there had been claims for seatback failures in Accents. FF 9, FF 53, CP 5315, 5329. At the time of this denial, Hyundai's own in-house legal department had already investigated and denied two claims for seatback failures in Accents. FF 14, 40-42, CP 5316, 5324-25.; Ex. 3 pp. 48-51. Between the time of Hyundai's false denial and the first trial, at least four additional claims were made for Accent seatback failures, but Hyundai failed to supplement its answers, FF 15, CP 5317, despite the fact that its own in-house legal department investigated and denied these claims as well. Ex. 3, pp. 65-68, 73, 77-78, 86-88, 90-91. Even more claims were made for Accent setback failures after the first trial, FF 46, CP 5326-27, but Hyundai still did not supplement its responses until Magana's counsel asked Hyundai to do so. There were claims of seatback

failures in Hyundai models other than the Accent as well. *E.g.,* FF 19. 48-49, CP 5318, 5327-28

Similar conduct by Hyundai in a Georgia case led the trial court to find "a pattern of lack [of] compliance with discovery obligations as required under Washington law." FF 23, CP 5319. Hyundai's in-house counsel was well-aware that the legal department worked closely with customer complaints and claims, even developing a form denial letter to send to customers. FF 25, CP 5320. Hyundai's defense for its failure to produce the Acevedo claim was that in-house counsel "did not recall" that the case involved a seatback claim, clearly establishing that Hyundai had no adequate document retrieval system. FF 28-29, CP 5321. It is an insult to Magaña's counsel to even compare their legitimate request that Hyundai update its discovery requests with the egregious misconduct of Hyundai's own in-house counsel.

CONCLUSION

AWB rhetorically compares this case to the classic film *Paths of Glory:*

> Unlike the French General Broulard in Stanley Kubrick's 1957 film, *Paths of Glory*, civil courts should not select occasional miscreants for execution as "a perfect tonic for the entire division." That is not what American courts do.

AWB 8. And that is not what the trial court did in this case.

Counsel for AWB is apparently unaware that Judge Johnson grappled earnestly with these issues, which she considered "one of the most difficult tasks that this Court has undertaken." 01/20/06 RP 1. Judge Johnson observed that she has "very high regard for attorneys and for the ethical standards of the conduct attorneys," especially as "a second generation attorney, raised by a father who had the highest regard for the ethical practices of attorneys and set a high standard himself." *Id.* at 18. Judge Johnson had the highest regard for Hyundai's trial counsel and his firm, and confessed that, "it is with considerable difficulty that I address the issue of willfulness." *Id.* at 19. However, Judge Johnson concluded that there was a clear record of discovery violations without reasonable excuse, especially in light of the active involvement of Hyundai's legal department. *Id.* at 19-20.

Judge Johnson found Hyundai's violations to be "egregious." FF 53, CP 5329. The discovery violations here were extraordinary and inexcusable. The default judgment was not entered as a mere example for other litigants and lawyers, but as the only possible sanction that would remedy the prejudice caused by Hyundai's misconduct. By its misconduct, Hyundai waived its right to a jury trial. This Court should reinstate the default judgment.

RESPECTFULLY SUBMITTED this ___ day of January, 2009.

Paul W. Whelan, WSBA 2308
Ray Kahler, WSBA 26171
STRITMATTER KESSLER WHELAN COLUCCIO

Derek Vanderwood, WSBA 24257
ENGLISH, LANE, MARSHALL, BARRAR STAHNKE & VANDERWOOD, PLLC

Michael E. Withey, WSBA 4787
LAW OFFICES OF MICHAEL WITHEY

WIGGINS & MASTERS, P.L.L.C.

_____
Charles K. Wiggins, WSBA 6948
Kenneth W. Masters, WSBA 22278
241 Madison Avenue North
Bainbridge Is, WA 98110
(206) 780-5033

Peter O'Neil, WSBA 28198
PETER O'NEIL ATTORNEY AT LAW

Alisa K. Brodkowitz, WSBA 31749
BRODKOWITZ LAW

CERTIFICATE OF SERVICE

I certify that I caused to be served, a copy of the foregoing **PETITIONER MAGAÑA'S ANSWER TO BRIEF OF AMICUS CURIAE ASSOCIATION OF WASHINGTON BUSINESS** postage prepaid, via U.S. mail on the ___ day of January 2009, to the following counsel of record at the following addresses:

Michael B. King
Gregory M. Miller
James E. Lobsenz
Carney Badley Spellman PS
701 5th Avenue, Suite 3600
Seattle, WA 98104-7010

Derek Vanderwood
English, Lane, Marshall, Barrar
Stahnke & Vanderwood, PLLC
12204 SE Mill Plain Blvd, Ste 200
Vancouver, WA 98684

Paul W. Whelan
Stritmatter Kessler
Whelan Coluccio
200 Second Avenue West
Seattle, WA 98119

Doug F. Foley
Foley Buxman, PLLC
Park Tower V
13115 NE Fourth Street, Ste 260
Vancouver, WA 98684

Ray Kahler
Stritmatter Kessler
Whelan Coluccio
413 8th Street
Hoquiam, WA 98550-3607

Peter O'Neil
Attorney at Law
3300 East Union Street
Seattle, WA 98122

Alisa K. Brodkowitz
Brodkowitz Law
3600 Freemont Avenue N.
Seattle, WA 98101-1397

Heather Cavanaugh
Miller Nash LLP
111 SW 5th Avenue, Suite 3400
Portland, OR 97204-3614

Michael E. Withey
Law Offices of Michael Withey
601 Union St Ste 4200
Seattle, WA 98101-4036

Stewart A. Estes
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104-3175

Aaron V. Rocke
Rocke Law Group PLLC
1700 7th Avenue, Suite 2100
Seattle, WA 98101-1360

Hugh D. Spitzer
Emanuel F. Jacobowitz
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Charles K. Wiggins, WSBA 6948
Attorney for Petitioner